

CHAPTER 17

CONTINGENCY AND DEPLOYMENT CONTRACTING

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CHAPTER 17

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I. REFERENCES.

- A. Army Federal Acquisition Regulation Manual No. 2 (Contingency Contracting), Nov. 1997.
- B. Air Force FAR Supplement, Appendix CC - Contingency Operational Contracting Support Program (COCSP), 1 May 2003.
- C. NAVSUP Instruction 4230.37A, 9 April 1996.
- D. Marine Corps Order (MCO) P4200.15G, Appendix B. Marine Corps Purchasing Procedures Manual
- E. Joint Pub. 1-06. Joint Tactics, Techniques, and Procedures for Financial Management During Joint Operations, 22 Dec 99.
- F. Joint Pub. 4-0. Doctrine for Logistics Support of Joint Operations, 6 April 2000. (Chapter V, Contractors in Theater)
- G. Joint Pub. 4-07, Joint Tactics, Techniques, and Procedures for Common-User Logistics During Joint Operations, 11 June 2001.
- H. Joint Pub. 4-08, Joint Doctrine for Logistic Support to Multinational Operations, 25 Sep 2002.
- I. Field Manual (FM) 27-100, Legal Support of Operations, 1 March 2000.
- J. LOGCAP Related Resources.
 - 1. AR 700-137, Logistics Civil Augmentation Program (LOGCAP), 16 Dec. 85.
 - 2. AMC PAM 700-30, Logistics Civil Augmentation Program (LOGCAP), 31 Jan. 00.

3. AMC PAM 715-18, AMC Contracts and Contractors Supporting Military Operations, June 2000.
 4. AMC LOGCAP Battle Book, 31 Jan. 00.
 5. AMC LOGCAP Homepage: <http://www.amc.army.mil/LOGCAP/>.
 6. DA PAM 700-31, Commander's Handbook for Peacekeeping Operations (A Logistics Perspective), 1 July 94.
 7. DA PAM 700-15, Logistics Support of United Nations Peacekeeping Forces, 1 May 86.
 8. DA PAM 690-80/NAVSO P-1910/AFM 40-8/MCO P12910.1, Use and Administration of Local Civilians in Foreign Areas During Hostilities, 12 Feb. 71.
- K. FM 3-100.21 (supercedes FM 100-21), Contractors on the Battlefield, 3 Jan. 03.
- L. FM 100-10-2 (aka 4-100.2), Contracting Support on the Battlefield, 4 Aug. 99.
- M. CLAMO CD-ROM: Deployed Judge Advocate Resource Library, Seventh Edition.
- N. Air Force Contract Augmentation Program (AFCAP) homepage: <http://www.afcap.com/>
- O. Defense Acquisition Deskbook, Contractor Support in the Theater of Operations, Deskbook Supplement, 28 March 2001. Available at:
<http://www.dscp.dla.mil/contract/doc/contractor.doc>.
- P. AT&L Knowledge Sharing System (AKSS) Acquisition Deskbook CD-ROM. Subscription available from: <http://deskbook.dau.mil/jsp/default.jsp>.
- Q. AR 715-30, Secure Environment Contracting (20 Nov. 2002).
- R. AR 715-9, Contractors Accompanying the Force, 29 Oct. 99 (currently being revised).

- S. DA PAM 715-16, Contractor Deployment Guide, 27 Feb. 98 (will be combined with the new AR 715-9, which is currently being revised).
- T. The Army Lawyer, January issue, annual Contract & Fiscal Law Year-in-Review article. Article contains updates on deployment contracting, Foreign Military Sales, Construction Contracting & Funding, and Operational Funding.
- U. References on JAGCNET: <http://www.jagcnet.army.mil/>. (Also available on the TJAGSA homepage: <http://www.jagcnet.army.mil/TJAGSA>. Once you reach the school's homepage, toggle on "Publications." No password or registration is required.)

II. INTRODUCTION.

- A. Objectives. Following this block of instruction, students should:
 - 1. Understand the importance of planning for contracting operations during deployments.
 - 2. Understand the typical contracting, finance, and resource management personnel support for contingency contracting.
 - 3. Understand the more frequently used methods of acquiring supplies and services during deployments.
 - 4. Understand the ratification process used to correct irregular procurements.
- B. Background.
- C. Applicable Law During a Deployment.
 - 1. International Law.
 - a. The Law of War – Combat.

- b. The Law of War – Occupation. This body of law may be directly applicable, or followed as a guide when no other laws clearly apply, such as in Somalia during Operation Restore Hope.
- c. International Agreements. A variety of international agreements may impact contracting operations in OCONUS locations.

- (1) Status of Forces Agreements (SOFA) or other status agreements may contain provisions impacting upon contracting activities.

- (2) Specific treaties or agreements may also impact contracting activities.

2. U.S. Contract and Fiscal Law.

- a. Armed Services Procurement Act of 1947, as amended. 10 U.S.C. § 2301-31.

- b. Federal Acquisition Regulation (FAR) and Agency Supplements.

- (1) FAR Part 25 and DFARS Part 225 govern foreign acquisitions.

- (2) Various service specific supplementary manuals provide a basic guide to contingency contracting and are highly recommended for a general overview of government acquisition. *See, e.g.* Army Federal Acquisition Regulation Manual No. 2 (Contingency Contracting), Nov. 1997; Air Force FAR Supplement, Appendix CC - Contingency Operational Contracting Support Program (COCSP), 1 May 2003; NAVSUP Instruction 4230.37A, 9 April 1996; Marine Corps Order (MCO) P4200.15G, Appendix B. Marine Corps Purchasing Procedures Manual.

- c. Fiscal Law. Title 31, U.S. Code; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures; DFAS-IN 37-1; DFAS Manual 37-100-XX (XX= current FY).

- D. Wartime Funding. Congressional declarations of war and similar resolutions may result in subsequent legislation authorizing the President and heads of military departments to expend appropriated funds to prosecute the war as they see fit.
- E. Wartime Contract Law. Congress has authorized the President and his delegates to initiate contracts that facilitate national defense notwithstanding any other provision of law. 50 U.S.C. § 1431-35; Executive Order 10,789 (Nov. 14, 1958); FAR Part 50.

II. PREPARATION FOR DEPLOYMENT CONTRACTING.

- A. General Considerations. *See* Chapter 3, FM 100-10-2 (aka FM 4-100.2), Contracting Support on the Battlefield, 4 Aug. 99.
 - 1. Plan early for contracting during a deployment.
 - 2. Identify and train personnel necessary for effective contracting in an overseas theater.
 - 3. Plan to deploy contracting personnel/teams with units to hit the ground first.
 - 4. Allocate assets necessary to support contracting efforts from current unit resources.
- B. Contracting Officer (KO)/ Field Ordering Officer (FOO) Support. *See* Section III, FM 100-10-2 (aka 4-100.2), Contracting Support on the Battlefield, 4 Aug. 99.
 - 1. Identify KO/FOO support requirements.
 - 2. Ensure proper appointment and training of KOs and FOOs.
 - a. Only contracting officers and their authorized representatives may obligate government funds.
 - b. Contracting officers (KO) receive their appointments from a Head of a Contracting Activity (HCA) or certain officials in the Army Secretariat. FAR 1.603; AFARS 5101.603-1.

- c. Contingency Contracting Officers (CCO) are special contracting officers that should be trained to operate in austere deployed environments and to work with contractors that may have limited knowledge of U.S. Government contracting practices.
- d. Field Ordering Officers (FOO) normally receive their appointments from a chief of a contracting office. AFARS 5101.602-2-90. A sample appointment letter is found at AFARS 5153.9002.
 - (1) Responsibilities. AFARS Manual No. 2, Appendix E.
 - (2) “Class A” paying agents may not be ordering officers. AFARS Manual No. 2, para. 1-2.i.
- e. Contracting officers and ordering officers are subject to limitations in appointment letters, regulations, and statutes.
- f. Training for contracting personnel must include procurement integrity and standards of conduct training. FAR 3.104; DOD Dir. 5500.7-R, Joint Ethics Regulation.
- g. Appointing authorities may limit contracting authority by dollar amount, subject matter, purpose, time, etc., or they may provide unlimited authority. Typical limitations are restrictions on the types of items that may be purchased, and on per purchase dollar amounts. FAR 1.603-3.
- h. Contracting officers execute, administer, or terminate contracts and make determinations and findings permitted by statute and regulation. FAR 1.602-1.

C. Administrative Needs.

- 1. Deployable units should assemble contracting support kits. Administrative needs forgotten may be difficult to obtain in the area of operations. Kits should contain a 90-day supply of administrative needs. *See* Appendix F, AFARS Manual No. 2.

2. CCOs should consider deploying with “bulk funding” in order to have readily available certified funds to establish the contingency contracting office without needing to seek specific certified funds for each separate acquisition. *See* p. 3-19, FM 100-10-2 (aka FM 4-100.2), Contracting Support on the Battlefield, 4 Aug. 99
3. Legal references.
 - a. Statutes: Titles 10, 31, and 41 of the U.S. Code.
 - b. Regulations: FAR; DFARS; AFARS/AFFARS/NAPS; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures; DFAS-IN 37-1; DFAS-IN Manual 37-100-XX (XX = current FY); and command supplements to these publications.
 - c. CD-ROM contract references and LEXIS/WESTLAW software.
 - d. Access to Internet.
4. Contract forms.
 - a. DD Form 1155, Purchase Order. See, DFARS 213.307.
 - b. Standard Form 44, Purchase Order-Invoice-Voucher. See, DFARS 213.306.
 - c. Standard Forms 26, Award/Contract; 30, Amendment; 33, Solicitation, Offer & Award; 1442, Construction SO&A; and 1449, Commercial Items.
 - d. Form specifications for common items.
 - (1) Subsistence items, such as bottled water, fruit, etc.
 - (2) Labor and other services.
 - (3) Fuel.

- (4) Billeting.
 - (5) Construction materials: plywood, gravel.
 - (6) Common items, such as fans, heaters, air-conditioners, etc.
 - e. Translations of contracting forms and provisions.
 - 5. Portable office equipment and office supplies.
 - 6. Personnel, including clerical support and translators. Host nation contracted support personnel may also have specific knowledge of the local vendor base, and business practices.
- D. Finance and Funding Support. *See* page 3-10 Funding Contracted Support, FM 100-10-2.
- 1. Certified funding. A deployable unit should coordinate to have funds certified as available in bulk to support deployment purchases. The Finance Officer should provide a bulk-funded DA Form 3953, Purchase Request and Commitment (PR&C), to any deploying unit. (USAF: AF Form 9, USN: NAVCOMPT Form 2276/2275.)
 - 2. Imprest funds. FAR Subpart 13.305; DFARS Subpart 213.305; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, paras. 020901-020908. *See* also AFARS Manual No. 2, Appendix B.
 - a. The installation commander may establish imprest funds of up to \$10,000.
 - b. Cashiers must receive adequate training.
 - c. The fund operates like a petty cash fund, and is replenished as payments are made.
 - d. Authorized individuals make purchases and provide receipts to cashier.

- e. The fund should include local currency.
- 3. “Class A” paying agents. Units must ensure personnel are properly appointed and trained. See DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, para. 020604.

III. CONTRACTING DURING A DEPLOYMENT.

A. Training and Appointing Contracting Personnel.

- 1. Units should ensure that contracting personnel have received necessary training. If time permits, provide centralized refresher training.
- 2. Review letters of appointment for contracting officers and ordering officers. Ensure that personnel know the limitations on their authority.

B. Contracting Support Kit. Review contents of the kit. Ensure that references include latest changes.

C. Requirements Generation.

- 1. Verification. Ensure that the G-4/J-4 for the operation reviews and approves requirements, to avoid purchases better filled through the supply system. AFARS Manual No. 2, paras. 2-3. Verification of requirements is now primarily accomplished by an “acquisition review board,” or “ARB,” or a “Joint Acquisition Review Board” or “JARB,” in the joint environment. *See*, AMC LOGCAP Battle Book, at 53 and page 2-13, FM 100-10-2.
- 2. The Joint Force Contracting Office(s) or the JARB will ensure that acquisitions are coordinated to preclude inter-service and inter-component competition for scarce resources in the theater. JOINT PUB. 3-57, JOINT DOCTRINE FOR CIVIL-MILITARY OPERATIONS (8 Feb. 2001), at III-21.
- 3. Statement of Work development. See AFARS Manual No. 2, para. 7-6.

D. Competition Requirements.

1. The government must seek competition for its requirements; normally full and open competition, affording all responsible sources an opportunity to compete, is required. 10 U.S.C. § 2304; FAR Part 6, FAR 2.101. There is no automatic deployment contracting exception.
 - a. The statutory requirement for full and open competition for purchases over the simplified acquisition threshold creates a 45-day minimum procurement administrative lead-time (PALT).
 - b. The 45-day PALT results from a requirement to publish notice of proposed acquisitions for 15 days (synopsizing the contract actions), and then to provide a minimum of 30 days for offerors to submit bids or proposals.
 - c. Two additional time periods extend the minimum 45-day PALT:
 - (1) time needed for requirement definition and solicitation preparation;
 - (2) time needed for evaluation of offers and award of the contract; and time needed for delivery of supplies.
2. Exceptions to the rule.
 - a. Unusual and compelling urgency. 10 U.S.C. § 2304 (c)(2); 41 U.S.C. § 253 (c)(2); FAR 6.302-2.
 - (1) This exception authorizes a contract action without full and open competition. It permits the contracting officer to limit the number of sources solicited to those who are able to meet the requirements in the limited time available. FAR 6.302-2.
 - (2) This exception also authorizes an agency to dispense with publication periods (minimum 45-day PALT) if the government would be injured seriously by this delay. It also allows preparation of written justifications after contract award. FAR 6.302-2(c)(1).

- b. National security may provide a basis for limiting competition. It may apply if contingency plans are classified. FAR 6.302-6.
- c. Public interest is another exemption to full and open competition, but only the head of the agency can invoke it. FAR 6.302-7.
- d. Use of the unusual and compelling urgency, and national security exceptions requires a Justification and Approval (J&A). FAR 6.303. Approval levels for justifications are (FAR 6.304):
 - (1) Actions under \$500,000: the contracting officer.
 - (2) Actions from \$500,000 to \$10 million: the competition advocate.
 - (3) Actions from \$10 million to \$50 million: the HCA or designee.
 - (4) Actions above \$50 million: the agency senior procurement executive. DFARS 202.101.
- e. Contract actions made and performed outside the United States, its possessions, or Puerto Rico, for which only local sources are solicited, are exempt from compliance with the minimum 45-day PALT time period, but not from the requirement for competition. See FAR 5.202 (a)(12); FAR 5.203; see also FAR 14.202-1(a) (thirty-day bid preparation period only required if solicitation is synopsisized). Use bid boards and local advertisements to obtain competition under these circumstances. AFARS Manual No. 2, para. 4-3.e and FAR 5.101(a)(2) & (b).

E. Contract Type. Although the contracting officer may select from a variety of contract types, firm-fixed-price contracts are used most often during deployments. See FAR Part 16; AFARS Manual No. 2, para. 8-4d(4). However, LOGCAP and Force “Sustainment” contracts are cost-plus-award-fee contracts.

- 1. Letter contracts and oral solicitations can expedite the contracting process in contingency operations.

- a. Letter contracts are preliminary contractual instruments that permit a contractor to begin work immediately. Approvals for use at the HCA level are required. See FAR 16.603; AFARS Manual No. 2, para. 8-4.d(5).
 - b. Oral solicitations are permissible when the delay in preparing a written solicitation would be harmful to the government. Use of oral solicitations does not excuse compliance with normal contracting requirements. See AFARS Manual No. 2, para. 8-2.b.
2. For an example of the types of procedures that will likely be employed to support contingency operations, *see* Memorandum, Office of the Assistant Secretary of the Air Force, Deputy Assistant Secretary (Contracting), subject: Rapid, Agile Contracting Support During Operation Iraqi Freedom, (21 March 2003) (listing undefinitized contract actions, urgent and compelling Justification and Authorizations, options for increased quantities, and accelerated delivery options as methods to be explored and utilized to support combat operations) *available at*:
<http://www.safaq.hq.af.mil/contracting/policy/AQC/info-2003/op-iraqi-freedom-21mar03.pdf>. *See also* Memorandum, Office of the Under Secretary of Defense, Director Defense Procurement and Acquisition Policy, subject: Emergency Procurement Flexibilities (20 May 2004) *available at* <http://www.acq.osd.mil/dpap/policy/policydocs.htm>

F. Methods of Acquisition.

1. Sealed bidding: award is based only on price and price-related factors, and is made to the lowest, responsive, responsible bidder. FAR Part 14.
2. Negotiation: award is based on stated evaluation criteria, one of which must be cost, and is made to the responsible offeror whose proposal offers either the low-cost, technically acceptable solution to the government's requirement, or the one representing the best cost – technical tradeoff, even if it is not lowest in cost. FAR Part 15.
3. Simplified acquisition procedures: used for the acquisition of supplies, nonpersonal services, and construction in amounts below the simplified acquisition threshold. FAR Part 13.

G. Sealed Bidding as a Method of Acquisition.

1. Contracting officers must use sealed bidding procedures if the four conditions enumerated in the Competition in Contracting Act are present. 10 U.S.C. § 2304(a)(2)(A); Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453.
 - a. Time permits the solicitation, submission, and evaluation of sealed bids;
 - b. Award will be based only on price and other price-related factors;
 - c. It is not necessary to conduct discussions with responding sources about their bids; and
 - d. There is a reasonable expectation of receiving more than one sealed bid.
2. Use of sealed bidding allows little discretion in the selection of a source. A clear description or understanding of the requirement is necessary to avoid discussions.
3. Sealed bidding normally is not used in deployment contracting, at least until the tactical situation stabilizes. It requires more sophisticated contractors, because minor errors in preparing bids will prevent government acceptance.

H. Negotiations as a Method of Acquisition.

1. Contracting Officers use negotiations, which are sometimes called competitive proposal procedures, when sealed bidding is not appropriate. 10 U.S.C. § 2304(a)(2)(B).
2. Negotiations permit greater discretion in the selection of a source.
 - a. Because the government evaluates other criteria in addition to price in a negotiated procurement, substantial time may be required to obtain and evaluate all required information before making an award decision.

- b. Negotiations procedures permit the government to use a “best value” basis for awarding a contract, and pay more to obtain a better product.
 - c. Offers are solicited by use of a Request for Proposals (RFP) and can allow discussions with offerors before submitting their best and final offer to permit better understanding of needs and capabilities.
- I. Simplified Acquisition Procedures. Simplified Acquisition is used almost exclusively. Neither sealed bidding or contracting by negotiation are needed with the availability of a \$1,000,000 threshold for simplified acquisitions.
 - 1. Activities may use simplified acquisition procedures to acquire supplies and services that are not estimated to exceed the simplified acquisition limitation. FAR 13.103(b); All Star Carpet & Bedding, Inc., B-242490.3, Apr. 4, 1991, 91-1 CPD ¶ 352.
 - a. A simplified acquisition is a procurement of supplies, services, and construction not exceeding the simplified acquisition threshold using simplified acquisition procedures. 41 U.S.C. § 403, FAR 13.003.
 - b. **Increased thresholds for contingency operations. 41 U.S.C. § 428a.** On October 28, 2004, Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, amended 41 U.S.C. § 428a, Special Emergency Procurement Authority, to increase the thresholds for procurements in support of a contingency operation as defined in 10 U.S.C. § 101(a)(13) .
 - (1) Simplified Acquisition Threshold. For purchases supporting a contingency operation but made (or awarded and performed) inside the United States, the simplified acquisition threshold is \$250,000. For purchases supporting a contingency operation made (or awarded and performed) outside the United States, the simplified acquisition threshold is \$1,000,000. 41 U.S.C. § 428a(b)(2); FAR 2.101.

- (2) Micro-purchase Threshold. For purchases supporting a contingency operation but made (or awarded and performed) inside the United States, the micro-purchase threshold is \$15,000. For purchases supporting a contingency operation made (or awarded and performed) outside the United States, the micro-purchase threshold is \$25,000. 41 U.S.C. § 428a(b)(1); FAR 2.101.
 - (3) Commercial Items Test Program. For purchases supporting a contingency operation, simplified acquisition methods may be used to purchase commercial item supplies and services up to \$10,000,000. 41 U.S.C. § 428a(c); FAR 13.500(e).
2. Choice of method. Contracting officers shall use the simplified acquisition method that is most suitable, efficient, and economical. FAR 13.003.
 - a. Purchase orders. FAR 13.302; DFARS 213.302; AFARS Subpart 5113.302 & 5113.306 (for use of the SF 44).
 - (1) A purchase order is an **offer** to buy supplies or services, including construction. Purchase orders usually are issued only after requesting quotations from potential sources. Issuance of an order does not create a binding contract. A contract is formed when the contractor accepts the offer either in writing or by performance. In operational settings, purchase orders may be written using three different forms.
 - (2) DD Form 1155 or SF 1449. This is a multi-purpose form that can be used as a purchase order, blanket purchase agreement, receiving/inspection report, property voucher, or public voucher. It contains some contract clauses, but users must incorporate all other applicable clauses. FAR 13.307; DFARS 213.307. AFARS Manual No. 2, Appendix J. *See* clause matrix in FAR Part 52. When used as a purchase order, the KO may make purchases up to the simplified acquisition threshold. Only KOs are authorized to use these forms.

(3) Standard Form (SF) 44. *See* Appendices A & B. This is a pocket-sized form intended for over-the-counter or on-the-spot purchases. Clauses are not incorporated. Use this form for “cash and carry” type purchases. Ordering officers, as well as KOs, may use this form. Reserve unit commanders may use the SF 44 for purchases not exceeding the micro-purchase threshold when a Federal Mobilization Order requires unit movement to a Mobilization Station or site, or where procurement support is not readily available from a supporting installation. FAR 13.306, DFARS 213.306, AFARS 5113.306, AFARS Manual No. 2, Appendix G. Conditions for use:

- (a) As limited by appointment letter.
- (b) Away from the contracting activity.
- (c) Goods or services are immediately available.
- (d) One delivery, one payment.

(4) Ordering officers may use SF 44s for purchases up to the micro-purchase threshold for supplies or services, except that purchases up to the simplified acquisition threshold may be made for aviation fuel or oil. A KO may make purchases up to the simplified acquisition threshold (\$100K normally, or \$1,000,000 if overseas in the theater where the SECDEF has declared a contingency). *See* DFARS 213.306(a)(1)(B).

b. Government-wide purchase card. Authorized card holders may acquire goods and services up to the micro-purchase threshold. FAR 13.301; DFARS Subpart 213.301, AFARS Subpart 5113.2.

- (1) Authorized government purchase card holders, including a KO, may use the cards to purchase goods and services up to the micro-purchase threshold. Even if not in a designated contingency operation, authorized purchase card holders outside the U.S. may make purchases up to \$25,000 for commercial items/services for use outside the U.S. if it is not for work to be performed by workers recruited within the U.S. DFARS 213.301. Cardholders may be authorized to utilize the card as a payment instrument for orders exceeding the micro-purchase threshold made against Federal Supply Schedule contracts, calls written against a Blanket Purchase Agreement (BPA) or orders placed against Indefinite Delivery/Indefinite Quantity (IDIQ) contracts that contain a provision authorizing payment by purchase card. AFARS 5113.202(c) and FAR 13.301(c)(2). A KO may use the card as a method of payment for purchases up to the simplified acquisition threshold when used in conjunction with a simplified acquisition method. Funds must be available to cover the purchases. Special training for cardholders is required. AFARS 5113.202. Issuance of these cards to deploying units must be coordinated prior to deployment, because there is insufficient time to request and receive the cards once the unit receives notice of deployment.
- (2) Accommodation Checks/Purchase Card Convenience Checks. Commands involved in a deployment may utilize accommodation checks and/or government purchase card convenience checks in the same manner as they are used during routine operations. Checks should only be used when Electronic Funds Transfer (EFT) or the use of the government purchase card is not possible. See DoD 7000.14-R, vol. 5, ch. 2, para. 0210; see also DFARS 213.270(c)(6) and 213.305-1(3). Government purchase card convenience checks may not be issued for purchases exceeding the micro-purchase threshold. See DoD 7000.14-R, vol. 5, ch. 2, para. 021001.E.1.

- c. Blanket purchase agreements (BPA). FAR 13.303; DFARS 213.303-5, AFARS 5113.303.

- (1) A BPA is a simplified method of filling anticipated repetitive needs for supplies or services essentially by establishing “charge account” relationships with qualified sources of supply. They are not contracts but merely advance agreements for future contractual undertakings. BPAs set prices, establish delivery terms, and provide other clauses so that a new contract is not required for each purchase. The government is not bound to use a particular supplier, as it would be under a requirements contract. KO negotiates firm-fixed-prices for items covered by the BPA, or attaches to the BPA a catalog with pertinent descriptions/prices.
- (2) KOs may authorize ordering officers and other individuals to place calls (orders) under BPAs. FAR 13.303, AFARS 5113.303-2. Existence of a BPA does not per se justify sole-source acquisitions/procurements. Consider BPAs with multiple sources. If insufficient BPAs exist, solicit additional quotations for some purchases and make awards through separate purchase orders.
- (3) BPAs are prepared and issued on DD Form 1155 or SF 1449 and must contain certain terms/conditions. FAR 13.303-3:
 - (A) Description of agreement.
 - (B) Extent of obligation.
 - (C) Pricing.
 - (D) Purchase limitations.
 - (E) Notice of individuals authorized to purchase under the BPA and dollar limitation by title of position or name.
 - (F) Delivery ticket requirements.
 - (G) Invoicing requirements.

- d. Imprest funds. FAR 13.305; DFARS 213.305; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, paras. 020901 to 020908; AR 37-103.

- (1) An imprest fund is a cash fund of a fixed amount established by an advance of funds from a finance or disbursing officer to a duly appointed cashier. The cashier disburses funds as needed to pay for certain simplified acquisitions. Funds are advanced without charge to an appropriation, but purchases are made with notation on the receipts returned to the imprest fund cashier of the appropriation, which will be used to reimburse the imprest fund for the amount of the purchase. See DoD 7000.14-R, vol. 5, ch. 2, para. 0209; DFARS 213.305-1. The maximum amount in a fund at any time is \$10,000, but can be increased to \$100,000 during a contingency operation. DoD 7000.14-R, vol. 5, ch. 2, para. 020903. During an overseas contingency operation as defined in 10 U.S.C. 101 (a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. 2302(8), imprest funds may be used for transactions at or below the micro-purchase threshold. DFARS 213.305-3.
- (2) Ordering officers, as well as KOs, may use the imprest fund procedures. Imprest fund cashiers, however, cannot be ordering officers and cannot make purchases using imprest funds. DoD 7000.14-R, vol. 5, ch.2, para. 020905.
- (3) Each purchase using imprest funds must be based upon an authorized purchase requisition. If materials or services are deemed acceptable by the receiving activity, the receiver annotates the supplier's sales document and passes it to the imprest fund cashier for payment. Alternatively, the imprest fund cashier may advance cash to an authorized individual to pick up and pay for the material at the vendor's location. See DoD 7000.14-R, vol. 5, ch. 2, para. 020906 B.

3. Competition requirements.

- a. Micro-purchases: Only one oral quotation is required, if the contracting officer finds the price to be fair and reasonable. FAR 13.202; N. Va. Football Officials Assoc., B-231413, Aug. 8, 1988, 88-2 CPD ¶ 120. Such purchases must be distributed equitably among qualified sources. FAR 13.202(a)(1). Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258. If practical, solicit quotes from other than the previous supplier before placing a repeat order.
- b. Above micro-purchase threshold up to the simplified acquisition threshold: Contracting Officers shall solicit quotations orally to the maximum extent practicable. FAR 13.106-1; Omni Elevator, B-233450.2, Mar. 7, 1989, 89-1 CPD ¶ 248. Normally soliciting three sources is reasonable. FAR 13.104(b). Do not omit incumbent contractors without good reason. See J. Sledge Janitorial Serv., B-241843, Feb. 27, 1991, 91-1 CPD ¶ 225.
- c. Do not split requirements aggregating more than the applicable threshold into several purchases merely to permit the use of simplified acquisition procedures. 10 U.S.C. § 2304(g)(2); FAR 13.003.
- d. Publication of notices. Subject to the following exceptions, the contracting officer is not required to publicize contract actions that do not exceed the simplified acquisition threshold.
 - (1) Public posting of a request for quotations for 10 days is required if the order is estimated to be between \$10,000 and \$25,000, except when ordering perishable subsistence items. 15 U.S.C. § 637(e); 41 U.S.C. § 416; FAR 5.101(a)(2).
 - (2) For a CONUS contract action, the contracting officer must publish a synopsis of all contract awards exceeding \$25,000 on the Government-wide point of entry (GPE) at FedBizOpps.gov. 15 U.S.C. § 637(e); FAR 5.101(a)(1).
 - (3) There is no requirement to publish a synopsis for a defense agency contract that will be made and performed outside the United States, its possessions or Puerto Rico, and for which only local sources will be solicited. FAR 5.202(a)(12).

J. Other contracting considerations:

1. Choice of Law/Choice of Forum. When executing contracts overseas, consider using the Choice of Law clause. DFARS 233.215-70 and 252.233-7001.
 2. Trade Agreements Act may apply if the contract is for the purchase of a good exceeding \$169,000 or construction exceeding \$6,481,000. See FAR 25.403 and DFARS subpart 225.4
- K. Using Existing Contracts to Satisfy Requirements. Existing ordering agreements, indefinite delivery contracts, and requirements contracts may already be available to meet recurring requirements, such as fuel and subsistence items.
1. Investigate existing contracts with contracting offices of activities with continuing missions in the deployment region. For example, the Navy had an existing contract for the provision of shore services to its ships in the port of Mombassa, Kenya. This contract was used to provide services to aircraft crews during Operation Provide Relief.
 2. Determine whether warranty requirements for major end items require the contractor to provide repair and maintenance service in the deployment region.
 3. Fuel. The Defense Energy Support Center (DESC) may be able to assist in the procurement of fuels in a contingency operation. More information is available at: <http://www.desc.dla.mil/main/deschome.htm>. The DESC emergency phone number is 1-800-2TOP OFF (1-800-286-7633).
- L. Contract Administration, Changes, Quality Assurance, and Terminations. FAR Parts 42, 43, 46, and 49.
1. Awarding contracts is only half the battle in deployment contracting operations. Contracting personnel must monitor performance closely to ensure the desired goods or services are actually delivered in a timely fashion.
 - a. Requiring units should provide personnel, such as contracting officer's representatives, to assist in monitoring contractor performance to the extent necessary. AFARS Manual No. 2, para. 7-6.b.

- b. For larger or more complex requirements, Defense Contract Management Agency has trained inspectors and administrative contracting officers to assist with contract administration. FAR Part 42. More information on DCMA may be found at: <http://home.dcm.mil/>.
 - c. For most contracts, the government relies on the contractor to perform detailed inspections and tests necessary to ensure conformance with contract quality requirements. FAR 46.202-2.
- 2. Under the Changes clause (see, e.g., FAR 52.243-1, Changes-Fixed-Price), the government has authority to require contractors to perform work necessary to achieve the overall purpose of the contract, even if the work actually needed differs somewhat from that specified in the original contract. The contract price is adjusted (a fair increase or decrease in price for the cost of the changed work, plus a reasonable adjustment to profit), if the government directs a change under the Changes clause. See AFARS Manual No. 2, para. 8-14c-e.
- 3. Government terminations.
 - a. Termination for Convenience clauses (FAR 52.249-1 through 52.249-6) give the government the right to terminate contracts without cause when doing so is in the government's interest. The contractor recovers its costs plus a reasonable profit on those costs in a convenience termination, but no anticipatory profits.
 - b. Termination for Default clauses (see, e.g., FAR 52.249-8, Default (Fixed-Price Supply and Service)) provide the government with the right to terminate a contract for cause.
 - (1) The three general bases for default termination are:
 - (a) Failure to deliver or perform on time;
 - (b) Failure to make progress which endangers performance;
or
 - (c) Failure to perform any other material provision of the contract.

- (2) Contractors may raise defenses to terminations for default (e.g., excusable delay, unreasonable inspections). If a contractor prevails on a defense, then its remedy is normally conversion of the default termination action to a termination for convenience.
 - (3) If the government terminates a contract for default successfully, the contractor generally receives payment only for goods actually delivered, and is subject to a later assessment of procurement costs (i.e., the cost of cover).
- 4. Practical problems in awarding and obtaining performance under government contracts in overseas theaters. AFARS Manual No. 2, paras. 3-3 (oral agreements) and 3-7 (multi-national programs).

M. Alternative Methods for Fulfilling Requirements.

- 1. LOGCAP Contract. In December 2001, the Army Material Command (OSC) awarded the third iteration of the cost-plus-award-fee LOGCAP (Logistics Civil Augmentation Program) contract to Halliburton KBR Government Operations Division. LOGCAP contract provides for comprehensive logistics and construction support to a deployed force anywhere in the world. Use of this contract to provide logistics support to a deployed force permits a commander to perform a mission with a smaller force than otherwise needed. See AR 700-137. The LOGCAP Homepage (Army AMC) is: <http://www.amc.army.mil/LOGCAP/>.
- a. Civilian contractor.
 - b. Provides logistics/engineering services to deployed forces, in such places as Somalia, Haiti, Rwanda, East Timor, and Iraq.
 - c. Balkans Support Contract (BSC). In an effort to maintain continuity, the first LOGCAP contractor, Brown & Root Services Corporation (BRSC), continued to provide logistics support for US forces in the Balkan theater of operations through a sole source award. Subsequently, on 19 February 1999 the BSC was competitively awarded to the incumbent BRSC. The BSC is a cost-plus-award-fee IDIQ. All requirements for new or expanded recurring services are staffed for approval through USAREUR DCSLOG.

2. AFCAP. Air Force Contract Augmentation Program. Similar to LOGCAP, AFCAP is primarily a civil engineering support contract, and can also provide limited services. The AFCAP homepage is:
<https://wwwmil.afcesa.af.mil/Directorate/CEX/CEXX/AFCAP/afcap.html> .
3. LOGJAMMS contract (Logistics Joint Administrative Management Support Services). It is a task-order driven multiple award contract. This contract is administered by Forces Command (FORSCOM) and is geared to provide support to FORSCOM, U.S. Army Reserve Command, Third Army, and TRADOC, and others upon request. LOGJAMMS is intended to augment existing base support services such as the LOGCAP contract. It provides similar services as the LOGCAP and other Force Sustainment contracts, but focuses more on equipment repair and maintenance support and other logistical support services. Unlike the LOGCAP contract, LOGJAMMS does not provide minor construction support. The LOGJAMSS homepage is:
<http://www.forscom.army.mil/aacc/LOGJAMSS/default.htm>.
4. Economy Act. 31 U.S.C. § 1535.
 - a. Executive agencies may transfer funds to other executive agencies, and obtain goods and services provided from existing stocks or by contract. For example, the Air Force may have construction performed by the Army Corps of Engineers, and the Army may have Department of Energy facilities fabricate special devices.
 - b. Procedural requirements for Economy Act orders are set forth in FAR Subpart 17.5, DFARS Subpart 217.5, and DFAS-IN 37-1.
 - c. General officer approval is required before placing Economy Act orders outside of DOD. See DFAS-IN 37-1, para. 1207.
5. Acquisition & Cross-Servicing Agreements (ACSA). 10 U.S.C. §§ 2341-2350, DoD Dir. 2010.9, and AR 12-1.
 - a. These authorities permit acquisitions and transfers of specific categories of logistical support to take advantage of existing stocks in the supply systems of the U.S. and allied nations. Transactions may be accomplished notwithstanding certain other statutory rules related to acquisition and arms export controls. The usefulness of these arrangements may be limited when the host nation has not invited U.S. intervention, or when the U.S. deploys forces unilaterally.

- b. Under the statutes, after consulting with the State Department, DoD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of logistic support, supplies, and services.
- c. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis. However, except during periods of active hostilities, reimbursable transactions (i.e., those where repayment in kind is not possible) are limited to a total of \$150M (credit) / \$200M (liability) per year for NATO and \$75M (credit) / \$60M (liability) per year for non-NATO allies.

6. Extraordinary Contractual Actions. Pub. L. No. 85-804; 50 U.S.C. § 1431-35; FAR Part 50.

- a. The Secretary of the Army has broad residual powers to initiate extraordinary contractual actions to facilitate national defense.
- b. Procedures for requesting use of these powers are set forth in FAR Subpart 50.4, DFARS Subpart 250.4, and AFARS Subpart 5150.1.

N. Leases of Real Property. 10 U.S.C. § 2675

- 1. Authority to lease is delegated on an individual lease basis. AR 405-10, para. 3-3b.
- 2. The Corps of Engineers using Contingency Real Estate Support Teams (CREST) negotiates most leases.
- 3. Billeting services are acquired by contract, not by lease.

IV. POLICING THE CONTRACT BATTLEFIELD.

A. Ratification. FAR 1.602-3, AFARS 5101.602-3.

1. Only certain officials (e.g., the chief of a contracting office, Principal Assistant Responsible for Contracting (PARC), or Head of a Contracting Activity (HCA)) may ratify agreements made by unauthorized persons.
1. There are dollar limits to the authority to ratify unauthorized commitments. AFARS 5101.602-3(b). The three approval levels are:
 - a. \$10,000 or less -- Chief of Contracting Office.
 - b. \$100,000 or less -- PARC.
 - c. Greater than \$100,000 -- HCA.
3. A ratifying official may ratify only when:
 - a. The government has received the goods or services.
 - b. The ratifying official has authority to obligate the United States now, and could have obligated the United States at the time of the unauthorized commitment.
 - c. The resulting contract would otherwise be proper, i.e., adequate funds are available, the contract is not prohibited by law, etc.
 - d. The price is fair and reasonable.

B. Extraordinary Contractual Actions. FAR Part 50.

1. If ratification is not appropriate (e.g., no price agreement with supplier), informal commitment procedures may allow compensation. FAR 50.302-3.
2. Requests to formalize informal commitments must be based on a request for payment made within six months of furnishing the goods or services; also, normal contracting procedures must have been impracticable at the time of the commitment to use extraordinary procedures. FAR 50.203(d).

3. These procedures have been used to reimburse owners of property taken during the Korean War (AFCAB 188, 2 ECR ¶ 16 (1966)); in the Dominican Republic (Elias Then, Dep't of Army Memorandum, 4 Aug. 1966); Jaragua S.A., ACAB No. 1087, 10 Apr. 1968; and in Panama (Office of the Gen. Counsel, Dep't of Army Memorandum, Jan. 1990).

C. Government Accountability Office (GAO) Claims.

1. The GAO has broad authority to settle claims against the United States. 31 U.S.C. § 3702(a); Claim of Hai Tha Trung, B-215118, 64 Comp. Gen. 155 (1984). The procedures are set forth in 4 C.F.R. Part 30 and in GAO Policies and Procedures Manual for the Guidance of Federal Agencies, Title 4. *See also* DFAS-IN 37-1, para. 090902.
2. Voluntary Creditors. Generally, government employees who make payments from private funds on behalf of the U.S. may not be reimbursed. *See* 31 U.S.C. § 1342; *see also* Voluntary Payments-Gov't Reimbursement Liability, B-115761, 33 Comp. Gen. 20 (1953). A limited exception to this rule applies to urgent, unforeseen emergencies. Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. Circumstances authorizing reimbursement include protection of government property; Meals-Furnishing-Gen. Rule, B-177900, 53 Comp. Gen. 71 (1973); and, unforeseen impediments to completion of an urgent agency mission; Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, *supra*.
3. If the GAO believes that it cannot pay a meritorious claim because an appropriation is not available for its payment, GAO reports to Congress. 31 U.S.C. § 3702(d). This report may form the basis for congressional private relief legislation.

D. Claims Under the Contract Disputes Act. FAR Subpart 33.2.

1. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-13, provides a statutory framework for resolution of claims arising under, or relating to, a government contract.

2. General procedures under the CDA.

- a. Contractor or the government asserts a claim, which the contracting officer reviews and evaluates for a decision;
- b. The contracting officer renders a final decision on the claim; and
- c. The contractor may appeal the final decision to either the U.S. Court of Federal Claims or the agency board of contract appeals.
- d. Claims for losses due to combat action must arise under the contract to be compensable. T&G Aviation, Inc., ASBCA No. 40428, 01-1 BCA ¶ 31,147.

- E. Redeployment. Ensure payments are finalized and recorded before redeployment. Coordinate for transfer of files to parent contracting organization for holding and resolution of issues that arise after redeployment.

V. INTERNATIONAL LAW CONSIDERATIONS IN THE ACQUISITION OF SUPPLIES AND SERVICES DURING MILITARY OPERATIONS.

- A. U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Goods. The law of land warfare regulates the taking and use of property by military forces. The rights and obligations of military forces vary depending on the ownership of the property, the type of property, and whether the taking occurs on the battlefield or under military occupation. Certain categories of property are completely protected from military action.

B. Acquisition of Enemy Property in Combat.

- 1. Confiscation. The permanent taking or destruction of enemy public property found on the battlefield. HR (Hague Convention Annex Reg.), art. 23, para. (g); HR, art. 53; Field Manual 27-10, Law of Land Warfare, para. 59, 393-424 (July 1956) (hereinafter FM 27-10).

- a. Confiscation is a taking without compensation to the owner. Thus, a commander may acquire the supplies of an enemy armed force and its government. Public buildings also may be used for military purposes.
 - b. If ownership is not known, a commander may treat property as public property until ownership is determined. FM 27-10, para. 394. Privately-owned military equipment, i.e., weapons, radios, etc., may be treated as public property and taken without compensation. HR, art. 53; FM 27-10, para. 403.
2. Seizure. The temporary taking of private property. When the use of private real property on the battlefield is required by military necessity, military forces may temporarily use it without compensation. For example, a deployed force might seize civilian construction equipment to augment its organic capability to dig into fighting positions. Private personal property, if taken, must be returned when no longer required, or the user must compensate the owner. HR, art. 53; FM 27-10, para. 406.

C. Acquisition of Enemy Property in Occupied Territories.

1. An occupation is the control of territory by an invading army. HR, art. 42; FM 27-10, para. 351. If a lawful government invites U.S. forces, the territory is not occupied, and U.S. forces have no right to take property.
2. Public personal property that has some military use may be confiscated without compensation. FM 27-10, para. 403.
3. The occupying military force may use public real property. FM 27-10, para. 401.
4. Private property capable of direct military use may be seized and used in the war effort. Users must compensate the owner at the end of the war. FM 27-10, para. 403.
5. Requisition. The taking of private property needed to support an occupying military force is known as requisition. Users must compensate owners as soon as possible. FM 27-10, para. 417. The command may levy the occupied populace to support its force, i.e., pay for the requisition.

- D. U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Services. The law of land warfare also regulates the use of prisoners of war and the local populace as a source of services for military forces. Prisoners of war and civilians may not be compelled to perform services of a military character or purpose.
- E. Use of Prisoners of War as a Source for Services During War.
1. Prisoners of war may be used as a source of labor; however, the work which prisoners of war may perform is very limited. Geneva Convention for the Protection of Prisoners of War (GPW), art. 49; FM 27-10, para. 125-133.
 2. Prisoners of war may not be used as source of labor for work of a military character or purpose. GPW, art. 49; FM 27-10, para. 126.
- F. Use of Civilian Persons as a Source for Services during War.
1. Commanders may not compel civilian persons to work unless they are over eighteen years of age, and then only on work necessary for the needs of the army of occupation, for public utility services, or for the feeding, sheltering, clothing, transportation, or health of the population of the occupied area. Geneva Convention Relative to Protection of Civilian Persons in Time of War (GC), art. 51; FM 27-10, para. 418-424.
 2. Protected persons may not be compelled to take part in military operations against their own country. GC, art. 51; FM 27-10, para. 418.
 3. The prohibition against forced labor in military operations precludes requisitioning the services of civilian persons upon work directly promoting the ends of war, such as construction of fortifications, entrenchments, and military airfields or transportation of supplies or ammunition in the zone of operations. There is no prohibition against their being employed voluntarily and paid for this work. FM 27-10, para. 420.
- G. Practical Considerations Concerning the Use of International Law Principles for Acquisition of Supplies and Services.

1. The uncertainty of these principles (confiscation, seizure, and requisition) to provide reliable sources for the acquisition of supplies and services makes them of little use except in emergency situations.
2. The impact that taking of private property or forced labor inevitably has on the populace may be detrimental to mission accomplishment.
3. The difficulty in accurately computing compensation owed without accurate records may lead to extensive claims work during the latter stages of an operation.
4. Providing speedy compensation under U.S. law is difficult.

VI. CONTRACTORS ON THE BATTLEFIELD.

- A. Civilian contractors may be employed in an Area of Operations (AO) to support U.S. Army force structures and/or weapon systems.¹
- B. Three categories of contractors can be used in a deployed environment: theater support contractors,² external support contractors,³ and systems contractors.⁴ Utilization of each category of contractor must be considered in operational planning.

1. See generally U.S. Dep't of Army, Army Regulation 715-9, Contractors Accompanying the Force (29 Oct. 1999). U.S. Dep't of Army, Pam 715-16, Contractor Deployment Guide (27 Feb. 1998), U.S. Dep't of Army, Army Material Command Pam 715-18, AMC Contracts and Contractors Supporting Military Operations (June 2000), U.S. Dep't of Army, Field Manual 3-100.21, Contractors on the Battlefield (3 Jan. 2003), and U.S. Dep't of Army, Field Manual 100-10-2, Contracting Support on the Battlefield (4 Aug. 1999). See also Memorandum, Acting Secretary of the Air Force, to ALMAJCOM-FOA-DRU/CC, subject: Interim Policy Memorandum—Contractors in the Theater (8 Feb 2001).

2 U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD, para. 2-15 (3 Jan. 2003); THE JOINT CHIEFS OF STAFF, JOINT PUB. 4.0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS V-1 TO V-3 (6 Apr. 2000) [hereinafter JOINT PUB 4.0]. Theater support contractors support deployed forces through preexisting contracts or contracts awarded from the theater of operations. They provide goods, services and minor construction, usually from the local vendor base, to meet the immediate needs of operational commanders. FM 100-10-2 at 2-15.

3 FM 100-10-2 at 2-15; JOINT PUB. 4.0 at V-1 to V-3. External support contractors provide support separate from theater support or systems contractors. External support contractors may be distinguished from the other types in that the contracting officers who award the contracts retain distinct authority separate from the theater PARC or systems offices. An example of this type of contract is the LOGCAP contract. FM 100-10-2, at 2-15.

4 FM 100-10-2 at 2-15; JOINT PUB. 4.0 at V-1 to V-3. Systems contractors provide support, during peacetime and conflict, for a particular end item or system such as a weapon system. These contractors commonly provided life cycle

- C. Contractor status in foreign country. Contractors may have status defined by an agreement (SOFA or SOMA) or may have no official status.
- D. Discipline.
 - 1. Discipline is the responsibility of the Contractor. However, the KO must ensure all necessary standards (GO #1, theater directives, policies, etc.) are incorporated into the contract.
 - 2. Criminal Jurisdiction is controlled by The Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261-67. The Commander must use the KO to exercise control over the actions of the contractor in non-criminal areas. For an excellent overview of the MEJA and implications on contractor activities, including draft contract language, see, Major Joseph R. Perlak, The Military Extraterritorial Justice Act of 2000: Implications for Contractor Personnel, 169 Mil. L. R. 92 (2001).
 - 3. The commander can utilize administrative sanctions (suspension of exchange or MWR privileges) or can effect the removal of a contractor employee (pursuant to the contract and with the KO's authority.)
- E. Compensation: (Insurance for contractor employees).
 - 1. Several programs are available to ensure "workers comp" type insurance programs cover contractor employees while deployed and working on USG contracts. See generally, FAR 28.305.

management for the systems they produce. Examples include support for vehicles, weapon systems and aircraft. FM 100-10-2 at 2-15.

- a. Defense Base Act (DBA) 42 USC §§ 1651-54, FAR 28.309 and 52.228-3; DFARS 228.305 and 228.370(a). See, Royal Indem. Co. v. Puerto Rico Cement Co., 142 F.2d 237, 239 (1st Cir. 1944), *cert. denied*, 323 U.S. 756 (1944) (holding that a construction employee working on a military base in Puerto Rico was covered by the DBA because the purpose of the DBA was to extend the benefits of the LHWCA to areas overseas and to obtain insurance at reasonable rates); Berven v. Fluor Co., 171 F. Supp. 89 (S.D.N.Y. 1959) (explaining that the statute covers individuals employed at any military, air, or naval base or contracts for the purpose of engaging in a public work); *See also, University of Rochester v. Hartman*, 618 F.2d 170, 173 (2d Cir. 1980) (holding that a service contract lacking a nexus with overseas construction project or work connected with national defense does not constitute “public work” within the meaning of 42 U.S.C. § 1651(a)(4)); O’Keeffe v. Pan American World Airways Inc., 338 F.2d 319 (5th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965) (holding that the frolic and detour rule for scope of employment analysis must be applied more broadly in the context of DBA claims because the statute was intended to avoid harsh results); Republic Aviation Co. v. Lowe, 164 F.2d 18 (2d Cir. 1947), *cert. denied*, 333 U.S. 845 (1948)
 - b. Longshore and Harbor Worker’s Compensation 33 USC §§ 901-950, DA PAM. 715-16, para. 10-5c to 10-5d. Applicable by operation of the DBA.
 - c. War Hazards Compensation Act (WHCA) 42 USC §§ 1701-17, FAR 52.228-4, DFARS 228.370(a). Huskisson v. Hawaiian Dredging Co., 212 F.2d 219, 220-21 (7th Cir. 1954); T&G Aviation, Inc., ASBCA No. 40428, 01-1 BCA ¶ 31,147 (ASBCA, 2000).
 - d. Federal Tort Claims Act (FTCA) 28 USC §§ 1346, 2671-80 (may provide an avenue for recovery.)
2. Capture & Detention. DA Pam 715-19, para. 11-1; DFARS 252.228-7003. Provides for government reimbursement for wages/salary paid to a detained, captured, or missing.

F. Work Hours.

1. The KO must consider the work hours/duty day for a given contractor in a deployed setting.

2. DFARS 252.222-7002 requires contractors to comply with local laws, regulations, and labor union agreements governing work hours.
3. The “Eight-Hour Law” (40 USC §§ 321-26) does not apply to overseas locations. FAR 22.103.1 allows for longer workweeks if such a workweek is established by local custom, tradition, or law.
4. SOFAs or other status agreements may impact workhours/workweek issues.

H. Continued Performance During a Crisis.

1. Commanders are rightly concerned about the continuation of contractor support in the face of combat/hostile operations.
2. U.S. DEP’T OF DEFENSE, INSTRUCTION 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING A CRISIS (6 Nov. 1990) (administrative reissuance incorporating Change 1, 26 Jan. 1996). The Instruction requires contractors to use all means available to continue to provide services deemed essential by DOD. The DODI is guidance for commanders; it does not bind contractors in any way.
3. There is no “desertion” offense for contractor personnel. Commanders should plan for interruptions in services, if the contractor appears to be unable to continue support.
4. Anecdotally, this has not been a problem.

I. Security/Force Protection.

1. Security for contractor personnel continues to cause concerns.
2. Doctrinally, DOS has the responsibility to protect non-DOD US citizens in the host nation/country of operations.
3. Contractors have responsibility to provide force protection and counter-terrorism awareness training to their employees similar to that provided to US Government employees. DFARS 225.74 and 252.225-7043

4. Contractor personnel may be armed for self-defense purposes. Contractor personnel generally cannot be required to accept weapons.
5. Arming contractors presents a host of status & other international law questions for the advising contract attorney.

VII. CONCLUSION.

- A. Identification and Proper Training of Contracting Personnel.
- B. Contract Funding and Methods of Acquisition: every deploying attorney should know the basics.
- C. Ratifications and Unauthorized Commitments.

ATTACHMENT A

INSTRUCTIONS FOR THE USE OF THE SF 44:

Instructions are located on the inside cover of the form booklet.

1. Filling out the Form

- (a) All copies of the form must be legible. To insure legibility, indelible pencil or ball-point pen should be used. SELLER'S NAME AND ADDRESS MUST BE PRINTED.
- (b) Items ordered will be individually listed. General descriptions such as "hardware" are not acceptable. Show discount terms.
- (c) Enter project reference or other identifying description in the space captioned "PURPOSE." Also, enter proper accounting information, if known.

2. Distributing Copies

Copy No. 1 (Seller's Invoice)- Give to seller for use as the invoice or as an attachment to his commercial invoice.

Copy No. 2 (Seller's Copy of the Order)- Give to seller for use as a record of the order.

Copy No. 3 (Receiving Report-Accounting Copy)-

- (1) On over-the-counter transactions where the delivery has been made, complete receiving report section and forward this copy to the proper administrative office.
- (2) On other than over-the-counter transactions, forward this copy to location specified for delivery. (Upon delivery, receiving report section is to be completed and this copy then forwarded to the proper administrative office.

Copy No. 4 (Memorandum Copy)- Retain in the book, unless otherwise instructed.

3. When Paying Cash at Time of Purchase

- (a) Enter the amount of cash paid and obtain seller's signature in the space provided in the seller section of Copy No. 1. If seller prefers to provide a commercial cash receipt, attach it to Copy No. 1 and check the "paid in cash" block at the bottom of the form.
- (b) Distribution of copies when payment is by cash is the same as described above, except that Copy No.1 is retained by Government representative when cash payment is made. Copy No. 1 is used thereafter in accordance with agency instruction pertaining to handling receipts for cash payments.

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TOP HALF

U.S. GOVERNMENT			
PURCHASE ORDER—INVOICE—VOUCHER			
DATE OF ORDER		ORDER NO.	
PRINT NAME AND ADDRESS OF SELLER (Number, Street, City, and State) ★			
P A Y E E			
FURNISH SUPPLIES OR SERVICES TO (Name and address) ★			
SUPPLIES OR SERVICES	QUANTITY	UNIT PRICE	AMOUNT
AGENCY NAME AND BILLING ADDRESS ★		TOTAL	
P A Y O R		DISCOUNT TERMS	
		----- % ----- DAYS	
		DATE INVOICE RECEIVED	
ORDERED BY (Signature and title)			

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BOTTOM HALF

ORDERED BY (Signature and title)	
PURPOSE AND ACCOUNTING DATA	
PURCHASER— To sign below for over-the-counter delivery of items	
RECEIVED BY	
TITLE	DATE
SELLER— Please read instructions on Copy 2	
<input type="checkbox"/> PAYMENT RECEIVED \$	<input type="checkbox"/> PAYMENT REQUESTED \$
NO FURTHER INVOICE NEED BE SUBMITTED	
SELLER	DATE
BY (Signature)	
I certify that this account is correct and proper for payment in the amount of \$	DIFFERENCES
	ACCOUNT VERIFIED: CORRECT FOR
(Authorized certifying officer)	BY
PAID BY <input type="checkbox"/> CASH	DATE PAID
OR (Check No.)	VOUCHER NO.
PLEASE INCLUDE ZIP CODE	1. SELLER'S INVOICE
	(See Instructions on Copy 2)
STANDARD FORM 44a (Rev. 10-83) PRESCRIBED BY GSA, FAR (48 CFR) 53.213(c)	